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II

[illegible]

Respondent apparently claims that there has been a change in the theory of the case as originally presented and as it now stands except that in the supplemental pleading the ultimate interest of the deceased [illegible] (Respondent's Brief, p. 7).

In the first complaint the plaintiff claimed to be entitled through her son to intestate property because of the will alleged violation of the rule against perpetuities, or a residuary because of the trust as void on its own or as illegal in the complaint, or "on the surviving issue in the event of the [illegible] deceased grandchild of the Young." In the second amended complaint, plaintiff claimed for the first time that the devise of the Young to the grandchildren constituted vested remainders and that plaintiff as the [illegible] was entitled to an interest in the [illegible]. It abandoned the rule against perpetuities point and the case on its own point.

In the first appeal the Court of Appeal assimilated the litigation to the *Hagan v. Hood*, 7 Wall. (74 U. S.) 62, but in case where the interest of distributees have been sold several and to the parties disposable, rather than to the partition case like *Barney v. Baltimore City*, 6 Wall. (73 U. S.) 280, where the interests are held in equity of several and to the parties indispensable. In the first appeal the Court of Appeal treated the prayer to partition as surplusage (58 F. 2d at 80).

Any fair comparison of the original complaint with the final complaint as limited at the trial will demonstrate, perforce, the difference between the two approaches.

II.

III.

II.

That the so-called absent parties are not indispensable.

in view of the controversy as to the character and number of the remaining interests would therefore seem very clearly to fall within the description of indispensable parties laid down by Mr. Justice Miller in *Shields v. Barrow*, 17 How. 130, 139, as follows:

> "and there is a third class whose interest in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such case the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

That should be the result in this case.

III.

The "Federal Question" Is Not Involved Here So As to Confer Jurisdiction Independently of the Diversity of Citizenship.

Respondent entirely misconceives this basis for jurisdiction, since it is not enough that respondent merely invoke jurisdiction on this ground. The jurisdiction must be supported by a substantial question of Federal statutory interpretation; and if the interpretation has already been authoritatively settled, jurisdiction because of a Federal question must fail.

The point raised by respondent under Point IV of his brief in opposition (pp. 25-27) is not even the same as that relied on in his petition for certiorari in Case No. 79 where respondent makes an attack upon the validity of the consolidation ruling, thus merely the point that as to the Title Guaranty trust there was no valid succession to the proceeding. In no substantial respondent's Point IV, the Federal question is supposed to arise as follows:

The Trustee originally named in the Will was First Trust and Savings Bank of Chicago, a corporation organized under the laws of the State of Illinois, on February 21, 1929, that corporation was consolidated with Union Trust Company, an Illinois corporation, and the consolidated company changed its name to First Union Trust and Savings Bank, an Illinois corporation. On July 17, 1931, First Union Trust and Savings Bank was consolidated into and merged with The First National Bank of Chicago, a national banking institution, pursuant to approval of the Auditor of Public Accounts of the State of Illinois, and a certificate of consolidation issued by the Comptroller of Currency of the United States.

Certainly no Federal question arises on the first consolidation of the two Illinois corporations. In fact, that consolidation was proper under the law of Illinois. *Chicago Title and Trust Company v. Kinzer*, 326 Ill. 21.

The respondent charges, in effect, that the last consolidation having been accomplished and authorized by the National Banking Act, known as the McFadden Act of 1927, a Federal question arose as to whether the consolidated bank had the power or authority to succeed to the trusteeship in the Otto Young Estate formerly exercised by its predecessors, First Trust and Savings Bank and First Union Trust and Savings Bank.

No Federal question arises out of those facts.

The McFadden Act of 1927 (12 U. S. C. A. Sec. 36 (a)) makes provision for consolidation of a State Bank with a National Bank. The consolidation in this case with The First National Bank of Chicago under the McFadden Act does not give the Federal Court jurisdiction. An Act of

Congress as provided. (Title 12 U. S. C. A. Sec. 1001); Southern Trust Co. v. Texas & Pacific R. R. Co., 234 U. S. 392, 398; Federal Land Bank (In re) Omaha and Four Interstate Casualty Co. v. United States National Bank of Omaha, 6th Circuit, 121 F. 2d 8 (C. C. A. 8, 1939); Deposit v. Brigham, 155 F. 2d 22 (C. C. A. 9, 1946, certiorari denied, 329 U. S. 779, 816.)

The Petitioner, but in the Farm Worcester County National Bank, 277 U. S. 24, was unable to constitutional on the ground that the challenged provision authorizing a bank incorporated or consolidated under the Act to succeed to the trusteeship of its predecessor was not directory but merely permissive; and that being permissive, the right of succession could depend upon the State law.

That question having been decided by this court no longer remains in ground for Federal jurisdiction. California Water Service Co. v. Redding, 304 U. S. 252, 255; Lawrence and Corrigan (In re) Morris, 299 U. S. 102, 105-6.

The only remaining question in this case is a State law question, namely, whether the Illinois State law would permit the institution consolidated or incorporated under the Act to succeed to the trusteeship of its predecessor.

V.

That the Public Interest Was Decided in Accordance With the Local Law.

Under this point respondent proves upon its (our) quotation from the opinion of the two courts below and its misconception that the quality of the respective interests involved in this case turns upon such a close question of state law that this Court, in line with its opinion in Spiegel v. Commissioner, 335 U. S. 701, will have no

[illegible] holding of the Court of Appeals. This misconception seems in large measure from the confusion resulting from the assumption that the *Rules* v. *Hillett*, [illegible] has a bearing on this case, and that *People* v. *Byrd*, [illegible] is distinguished.

Frankly, we can do no more in this reply brief than to refer to our original petition (pp. [illegible]) and point out that we do not rely on *Rules* v. *Hillett* but on the square decision of *People* v. *Byrd*, which involved precisely equivalent language and has never been questioned in any Illinois decision.

The opinion below is not, and cannot, explain away the clear and unimpeached holding of the highest court in Illinois construing language which is the precise equivalent of that at issue in this case. The decision below has decided an important issue of local law in a way in conflict with applicable local decisions. It should be reversed.

II.

Neither Rule Nor Decision

Respondent's final misconception seems to be that the Rules of Civil Procedure have changed the well established principle that the entry of a decree over indispensable parties can never constitute reversible error. We find nothing in the Rules cited by respondent or in the decisions since the promulgation of the Rules which support any such contention.

Rule 21 provides that misjoinder (and not a respondent summae non-joinder) is not ground for dismissal of an action.

Rule 12 (h) expressly except from any waiver by it[illegible] failure to include in motion or answer, "the defense of failure to join an indispensable party."

It was well settled both before and after the promulgation of the Rules that non-joinder of indispensable parties is a matter of such substance that an appellate court may properly consider the defect even though the point was not raised in the trial court. *See v. Wilson*, 9 Wall. (76 U. S.) 331, 340; *Payne v. Brooks*, 115 F. 2d 776, 777 (C. A. D. C., 1939); *McConnell v. Dennis*, 112 Fed. 647, 650 (C. C. A. 9, 1901); *Brown v. Christmas*, 128 F. 2d 122, 132 (C. A. D. C., 1942).

In this case the petitioner-defendants preserved the point of lack of indispensable parties in their answer and in their assignment of error. (R. 19-20; 39-40.)

For the reasons aforesaid, petitioners crave that prayer for review of the above cause by issuance of the writ of certiorari.

Respectfully submitted,

DAVID A. WILSON,

Attorney for Marie Julia Young Kaufman Pratt, Ida Young Kaufman, Catherine Ursula Young Bierstein Anderson, Ann Elizabeth Young Tyler, Young Young Wicker Bass, Walter P. Wicker, Jr., Catherine Young Alexander, and John William Young Martin, Petitioners.

[Illegible]:

[Illegible]

112 South La Salle Street,

Chicago, Illinois.